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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 49.

DOROTHY BAILEY, *Petitioner,*

v.

SETH W. RICHARDSON, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PETITIONER.

THURMAN ARNOLD,
ABE FORTAS,
PAUL A. PORTER,
MILTON V. FREEMAN,
Counsel for Petitioner.

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TABLE OF CONTENTS.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement of the Case	3
A. Petitioner	3
B. The Loyalty Proceedings	3
C. Court Proceedings	10
Summary of Argument	11
Argument	14
I. Executive Order Number 9835 Requires that Findings of Disloyalty and Ineligibility for Government Employment Be Supported by Evidence in the Record	15
1. The plain intention of the Order is to provide a fair hearing under traditional American standards	15
2. The present procedures of many of the loyalty boards in non-sensitive agencies show that the effectiveness of the loyalty program will not be impaired by requiring that the accused be confronted with the evidence against her	20
3. The reasons given by the court below for construing the term "evidence" to include undisclosed secret information are not supported either by the Order itself, by any consistent administrative interpretation of the Order or by the necessities of security	26
II. The Declaration of Ineligibility for Government Employment is a Punishment Which Has Been Illegally Inflicted Without Due Process	33

Page

III. The Order Abridges Freedom of Speech and Assembly 39

Conclusion 40

Appendix 41

TABLE OF CASES.

Hecht Co. v. Bowles, 321 U. S. 321 18
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88 17
Morgan v. United States, 304 U. S. 1 .....17, 22
New State Ice Co. v. Liebman, 285 U. S. 262 39
Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 28
United States v. Joseph Alstoetter, et al, United States Military Court at Nuremberg, Germany 20
United States v. Grayson, 166 F. 2d 863 (CCA 2, 1948) 27
United States v. Lovett, 328 U. S. 303 .....13, 34, 35, 37, 38
United States ex rel Knauff v. Shaughnessy, 338 U. S. 537 19
Wong Yong Sun v. McGrath, 339 U. S. 33 19

MISCELLANEOUS.

The Dreyfus Case, by Alfred Dreyfus and Pierre Dreyfus, Yale University Press, 1937 19
Executive Order 9835, 12 F. R. 1935, March 21, 1947 .. 41
Universal Declaration of Human Rights 18
S. Rep. No. 2158, 81st Cong., 2d Sess. 31, 37
Rule 43, Federal Rules of Civil Procedure 17

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OPINIONS BELOW.

The opinions in the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Edgerton (R. 114), have not yet been officially reported. The oral opinion of the District Court (R. 107-111) has not been officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 22, 1950. A petition for a writ of certiorari was filed April 19, 1950 and granted on June 5, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254 (formerly §§ 239 and 240 of the Judicial Code).

QUESTIONS PRESENTED.

I. Whether a person may be adjudged ineligible for government service and dismissed from a non-sensitive position, by administrative proceedings before a loyalty board, because of doubt as to her loyalty, (1) where there is no evidence against her whatever, (2) where the only evidence presented consists of a conclusive showing in her favor, and (3) where the only basis for the determination against her is secret information obtained from confidential informants whose identities are unknown to the court, the employee or the loyalty board making the decision.

The above question involves the following subsidiary questions:

a. Whether such administrative proceedings are consistent with the Executive Order under which they were held which provides for "maximum protection" to the government and "equal protection" to employees against "unfounded accusations of disloyalty" and which further provides that the findings must be after "hearing" and on "all the evidence."

b. Whether such administrative proceedings are consistent with the Constitution and in particular with the First, Fifth and Sixth Amendments.

c. Whether an executive order purporting to authorize the determination of ineligibility for government service generally without regard to the nature of the position by administrative finding of a reasonable doubt as to loyalty is authorized by law or is valid under the Constitution.

STATUTES AND REGULATIONS INVOLVED.

Executive Order 9835 (the so-called Loyalty Order), 12 F. R. 1935, March 12, 1947, is set forth in the Appendix to this brief.

STATEMENT OF THE CASE.

A. Petitioner.

Petitioner, Dorothy Bailey, has been in the government service almost continuously since November 1933. None of the positions which she held was in any sense secret or sensitive. (R. 34) She was engaged in helping Employment Services of the various States in training their personnel. Her work was based on a public document issued by the United States Employment Service and the training programs she developed were also available to the public in public libraries. (R. 34) She never had access to any secret information of any kind nor was her service in training employees connected with any security or sensitive agency.

Petitioner had received Civil Service status in 1940. (R. 4, 70) In June 1947 due to a drastic reduction in force in the USES, petitioner was separated from the payroll. On March 25, 1948, she was reinstated to her old position as staff training supervisor in the USES. On May 28, 1948, she was advised that her reinstatement as a classified civil service employee was made permanent. (R. 4, 18, 19)

Petitioner's service in the United States government has been consistently good and she is recognized throughout the country as an expert in the specialized field of staff training. Her efficiency ratings were uniformly high. (R. 4, 32, 71)

B. The Loyalty Proceedings.

On the 31st day of July, 1948, some two months after her reinstatement was made permanent, petitioner received an interrogatory from the United States Civil Service Com-

mission requesting certain information purporting to be relevant to her employment with the United States government. On August 9 petitioner, under oath, answered the interrogatories which raised questions as to her membership in and her association with various organizations. No formal charges were at any time served upon her. (R. 5, 20-25, 71, 72)

On September 13, 1948, pursuant to notice, she appeared before a Board of the Fourth Civil Service Region. The Board stated that it was inquiring whether "reasonable grounds exist for the belief that the person involved is disloyal to the government of the United States", a standard set forth by Executive Order 9835, 12 F. R. 1935, March 21st, 1947, the so-called Loyalty Order. (R. 5, 72) At the said purported hearing no persons appeared to testify against Miss Bailey. (R. 72) She was asked questions which stated or indicated that the Civil Service Commission had information that she had been a member of or affiliated with the Communist Party. (R. 6, 74)[1] She denied these charges specifically, affirmatively and circumstantially and refuted all implications to this effect. (See Loyalty Board Hearing (L. B.) 15-19, and *passim*)[2]

Petitioner was examined at great length during the hearing on a number of subjects having little or no relation to the questions appearing on the interrogatories. In ad-

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[1] There was some question about two other organizations. One of these was the American League for Peace and Democracy with which Miss Bailey had a brief and casual connection (R. 23, 24). With the other, the Washington Committee for Democratic Action, she stated she had no connection whatever (R. 24). Very little attention was paid to these allegations in the hearings and they were apparently of no concern to the Loyalty Review Board.

[2] Transcripts of the hearing and of the later hearing before the Loyalty Review Board are in the Record. These parts of the Record have not been printed but are being supplied to the Court in mimeographed form as they were to the court below. The Loyalty Board hearing will be cited as L. B., the Review Board Hearing as L. R. B., certain compiled affidavits as Aff., and a Personal History Statement as P. H.

dition to petitioner's specific denials that she had any relationship or sympathy with the Communist Party or any activities which are in any way connected with the Communist Party or with Communism, petitioner denied affiliation with any organization that advocated the overthrow of the government of the United States. (L. B. 14) No person appeared to testify against her. (R. 7, 75)

The allegations of membership or affiliation with the Communist Party were of most general and indefinite form. They were not detailed. They had no reference to times, places or dates and were in substance blanket generalized allegations. (L. B. 15-19) The informants against her were not identified directly or indirectly and it appeared later that even the Board members had no knowledge of who the informants were. (L. R. B. 11)

Petitioner produced in her behalf witnesses who testified affirmatively as to her loyalty. The Minister of the Metropolitan Memorial Methodist Church of Washington, D. C., appeared. (L. B. 106, 107) Various officials of the USES appeared. (L. B. 48, 107, 114). In addition, affidavits were submitted by persons who could not be present but who were prominent in business and who knew Miss Bailey. (Aff. 1, et seq.) (R. 5, 73) The record made before the Panel consisted entirely of petitioner's testimony and the testimony of others favorable to her without a single syllable of evidence to the contrary. (L. B.)

Statements were made by the Examiner of the Board and by the Board members that secret files contained allegations that investigating agencies of the government had received information from informants, some of whom were certified as reliable, which information was contrary to her testimony and the testimony of the witnesses who appeared in her behalf. These files were not available for examination by Miss Bailey or her counsel, nor was she permitted to know their substance except as generally stated by the Chairman of the Review Panel, as hereinafter described. The persons who supplied this information did not supply it

under oath (R. 7, 75); they were not identified to the petitioner or to the Board members. (L. R. B. 11, 72)

Nevertheless, on November 1, 1948, the Board advised Miss Bailey that ". . . it has been found that, on all the evidence, reasonable grounds exist for belief that you are disloyal to the Government of the United States.

"Your application for or eligibility from each of the examinations mentioned below has been cancelled[3] and you have been barred from civil service examinations in the Federal service for a period of three years from October 29, 1948. When the period of debarment has expired the Commission will, upon request, consider the removal of the bar." (R. 26)

On the same day the Board wrote the United States Employment Service advising of its finding and stating that "Therefore, she (Miss Bailey) has been rated ineligible for Federal employment; she has been barred from competing in civil service examinations for a period of three years, and your office is instructed to separate her from the service." (R. 27) The Board's instructions were followed and Miss Bailey was suspended pending appeal. (R. 28, 29)

Miss Bailey appealed to the Loyalty Review Board, and was heard on December 8, 1948. There, she again appeared and testified at length on her own behalf (L. R. B.) and presented an affidavit which clearly, specifically and in detail established that she could not have been guilty as alleged of membership in the Communist Party. (P. H.) Not only her own affidavit, but the affidavits of others were presented both as to her character and as to her public positions contrary to the position which any Communist could have

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[3] At the foot of the letter was a list of civil service registers on which Miss Bailey's name appeared as eligible for appointment to government positions on the date of the Loyalty Board's letter and from which her name was being removed. They were as follows:

"Examinations: Training Specialist, CAF-11, 12, 13 (Central Office, Civil Service Commission).

"Administrative Officer CAF-11, 12, & 13.

"Attachment Training Specialist CAF-11, 12, 13 (Fourth Regional Office, Civil Service Commission)." (R. 27)

taken. She submitted in her behalf some 60 affidavits which came from persons who knew her well. They came from 15 states and included bankers, corporation officials, federal officials, state officials, union members, former union members, etc. (Aff. See also R. 43-45) No one appeared against her. No persons purporting to have knowledge testified or even made a statement against Miss Bailey. (R. 9, 79)

Her affirmative case established that she had publicly and to the knowledge of a number of the affiants taken positions inconsistent with the charge of membership in or affiliation with the Communist Party. Thus it was clearly established not only by petitioner's testimony and her own affidavit (P. H. 7-10) but by the testimony of a number of other persons that she had favored the Marshall Plan, a position notoriously opposed to that of the Communist Party. (L. B. 53, 112, 113) (See e.g., Affs. Messrs. Limbert and McCarthy.)[4] In 1940 during the period of the Nazi-Soviet Pact, she had favored Lend-Lease and was very critical of the Soviet Union's position. (L. B. 54, 55, 112, 113, Aff. McGee) In her own union she had urged that the officers sign the non-Communist affidavit. (P. H. 9, Aff. Limbert) She had opposed in her union a foreign policy resolution which was widely publicized as being pro-Russian and had suggested another resolution which was the official CIO resolution on foreign policy at the time. (P. H. 9, Aff. Limbert)

In the face of this there was only, according to the Chairman of the Review Board, secret information in the secret files given by persons not under oath and not known even to the members of the Loyalty Board and the Review Board. (L. R. B. 11, 72) At the hearing before the Loyalty Review Board (part of the record herein), the Chairman of the Panel made the following statement (L. R. B. 10, 11):

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[4] These affidavits are in unnumbered pages separated to show first the affidavits submitted to the lower board, then those submitted to the Review Board. Within these categories the affidavits are included in alphabetical order.

"The charge developed in these interrogatories I don't understand is confined to a union. It is that she was a member of the Communist Party in the District of Columbia as early as 1935 and that in the early days of the War period she attended Communist Party meetings, and later when she became active in the Union she continued her membership—that is the communistic membership. Again about 1936 she was a known member of the so-called closed group of the Communist Party operating in the District of Columbia, and was one of those responsible for establishing a minority group in the Central Labor Council. Again that Bailey was a member of the Communist Party and has been for seven or eight years.

• • •

" . . . That Miss Bailey is either a member of the Communist Party or is completely dominated and controlled by them to the extent she follows their policy and instructions and has been doing so for a period of some eight years. That Miss Bailey is considered a member, if not an actual member one who is entirely controlled by the Communist leaders in the District of Columbia. Then that constitutes, to paraphrase as I did it, the basis for the charge against Miss Bailey."

• • •

CHAIRMAN RICHARDSON:

"I can only say to you that five or six of the reports come from informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable.

MR. PORTER (Counsel for Miss Bailey):

"We would like to have their names, and I would challenge any one of them to state it publicly in a non-privileged form.

CHAIRMAN RICHARDSON:

"I want to put it up to you in the light of which the Regional Board was considering it. It wasn't on the basis of union activity; it was on the basis of a communistic activity.

MR. PORTER:

"Mr. Chairman, would we be privileged to obtain at least this much information? Those informants which are judged reliable by the Federal Bureau of Investigation, have they been active in the Federal Workers Union activity?

CHAIRMAN RICHARDSON:

"I haven't the slightest knowledge as to who they were or how active they have been in anything."

At pages 71 and 72 (L. R. B.), the Chairman, referring to the statement of confidential informants, stated:

" . . . If this testimony is true, it is neither gossip nor malicious. We are under the difficulty of not being able to disclose this.

MR. PORTER:

"Is it under oath?

CHAIRMAN RICHARDSON:

"I don't think so."

The answer admits that the identity of informants was not disclosed "nor was the information given under oath". (R. 75) Nevertheless, that Board on February 9 wrote Miss Bailey stating that the Board had reached the conclusion that the evidence in the entire record was sufficient to sustain the finding and decision of the Fourth Regional Loyalty Board and that the Federal Security Agency had been asked to dismiss the plaintiff at once. It affirmed "the decision of ineligibility by the Fourth Regional Loyalty Board." (R. 63, 65) No statement of reasons was made other than the general allegation above.

Miss Bailey was formally removed from her employment on the basis of the order of the Review Board panel (R. 30).

Thereafter, Miss Bailey requested review by the full Loyalty Review Board rather than by a Panel and this was denied on March 18. (R. 11, 67, 81, 82)

C. Court Proceedings.

The present action was then commenced requesting a declaration that appellant was illegally dismissed and held ineligible for government service. Reinstatement and other relief was requested. (R. 15, 16) The defendants are the Federal Security Administrator, the members of the Loyalty Board and Review Board Panels and the Civil Service Commissioners. (R. 3) By reason of a subsequent transfer of the functions of the USES to the Department of Labor, the Secretary of Labor was added as a party. (R. 148) Cross motions for summary judgment were filed by appellant and appellees. (R. 104, 107) The District Court (per Holtzoff, J.) denied the appellant's motion for summary judgment and granted the motion of appellees for summary judgment. (R. 107-111)

The Court of Appeals by a 2-1 vote sustained the dismissal of petitioner and the finding making her ineligible for government service. It reversed only the provision of the order of the Civil Service Loyalty Board barring her from competing in civil service examinations for three years on the ground that such a bar was punishment which could not constitutionally be imposed without evidence in the legal sense as distinguished from secret "information." The Court of Appeals remanded the case for the entry of the decree "holding invalid those sections of the orders of the Loyalty Boards and the Federal Security Agency which would bar Miss Bailey from employment for three years, and holding valid those sections which accomplished her removal from the rolls and from office in the classified civil service." (R. 136) This mandate has been stayed pending the disposition of this petition.

Judge Edgerton in a dissenting opinion (R. 136) held that the dismissal was illegal because (1) the Executive Order required that the finding of ineligibility must be "on all the evidence" and therefore could not be made upon secret information; (2) any dismissal for disloyalty and declaration of ineligibility for federal employment is a

punishment requiring the safeguards of a judicial trial; and (3) the dismissal and adjudication of ineligibility in this case abridged freedom of speech and assembly.

SUMMARY OF ARGUMENT.

I.

Executive Order No. 9835 Requires that Findings of Disloyalty and Ineligibility for Government Employment Be Supported by Evidence in the Record.

(1) The Order specifically provides for hearings and for decisions "on all the evidence". Its preamble states its purpose to be to provide "equal protection" to the government and to the employee. The language is plain and the intention is explicit. The Order requires a hearing in the traditional American sense. No such hearing was given in the present case. The decision was admittedly based on secret information undisclosed to the accused. The only evidence in the record was favorable to the employee.

(2) A decision requiring hearings on evidence will not impede or hamper the loyalty program. In many agencies, loyalty boards now require evidence against employees to be produced. The program operates successfully and fairly in those agencies. A decision that the loyalty boards must make their rulings only on evidence will merely affirm as a legal requirement the procedure now in effect in many agencies. No advantage can be gained, as the experience of many non-sensitive agencies shows, by abandoning the principle of giving employees a fair hearing in a real sense. No danger exists in such agencies which justifies the abandonment of this principle of fairness and justice.

(3) Congress after full hearing and study of the problem of security has recently passed a bill dealing with dismissals in sensitive agencies. Here the danger is real and not based merely upon the understandable desire that disloyal persons should not enjoy the privilege of govern-

ment employment. Nevertheless, Congress deemed it sufficient for national security to authorize sensitive agencies to sever suspected individuals from the particular sensitive agency for which they worked in cases where there was no hearing on "all the evidence." No finding of disloyalty and general ineligibility was considered necessary for security where employees were discharged from sensitive agencies on undisclosed information. *A fortiori* in non-sensitive agencies it is still safe to treat the majority of government employees according to the principles of American justice.

(4) The reasons given by the majority below are invalid.

a. The fact that "material and information" collected by investigative agencies may be withheld under appropriate sections of the Order is in no way an indication that adjudications of disloyalty were intended to be made on the basis of such undisclosed information. The standard for a finding of disloyalty is specifically required to be based on "all the evidence." In this connection the terms "material and information" do not appear.

b. The majority's argument that the President must have known about this case and is therefore presumed to approve it is not an appropriate canon of construction.

c. The argument of the majority that it is following the administrative construction is invalid because here there has been no consistent administrative construction that an adjudication of disloyalty may be made without evidence.

d. The argument of the majority below that there is a conflict between the interests of security and the case for Miss Bailey has nothing to support it. In adopting this basis for its decision the court below usurped the functions of the President and the Congress and wrote into the law its own notions of security requirements. Such notions are at variance with the views which both the Congress and the President have adopted.

II

The Declaration of Ineligibility for Federal Employment is a Punishment Which Has Been Illegally Inflicted Without Due Process.

(1) The Loyalty Board's decision against Miss Bailey is a finding of disloyalty and consequent ineligibility for government employment, made without evidence. The *Lovett* case (*United States* v. *Lovett*, 328 U. S. 303) establishes that such a declaration of ineligibility is punishment. The Sixth Amendment requires a judicial trial before such punishment may be imposed. Even if an administrative trial were held sufficient to impose such a punishment, it could only be on condition that it was a fair hearing based on evidence which an employee has an opportunity to meet.

The case does not involve the dismissal of an employee because he or she does not have the special qualifications of reliability required for a particular position. Such dismissals may properly be made without evidence. The dismissal here has no basis other than that Miss Bailey is found to be disloyal and as a consequence ineligible for government employment. In such a case the Constitution requires at least a fair trial.

(2) The court below recognized that under the *Lovett* case a declaration of ineligibility is punishment. It thought it had removed this defect and made Miss Bailey eligible by its partial reversal of the Board's order, striking out the provision barring her from taking civil service examinations for three years. It was clearly in error in this. The whole tenor and purpose of the order is to prevent persons found to be subject to reasonable doubt as to loyalty from serving the government in any capacity. So long as the findings of disloyalty stand Miss Bailey is permanently and absolutely ineligible even if she succeeds in passing civil service examinations.

The court would have been in error in assuming that a dismissal should be sustained even if it had reversed the

finding of disloyalty and thus in theory at least made Miss Bailey eligible. If the loyalty finding is reversed the court must restore Miss Bailey to the position she lost because of that illegal finding. Any other conclusion would give complete sanction to a declaredly illegal ruling.

III.

The Order Abridges Freedom of Speech and Assembly.

The vague standards of the order permit loyalty boards to consider and determine cases on the basis of the opinions and associations of employees. This dangerously limits their freedom of speech at a time when it is most important that government employees be free to discuss, without fear of suspicion of disloyalty, every aspect of national policy. Every side of such questions must be debated and considered without fear that a minority view might subject its holder to a finding of disloyalty on secret accusation. If not, the eventual policy which emerges cannot be based on a realistic appraisal of the complex factors which disturb the world today.

ARGUMENT.

The questions which raise the constitutionality of the decision need not be considered until the Court first determines whether the procedure followed by the Loyalty Board conformed to the requirements of the Executive Order which established the Board and defined its authority. If it does not conform to this Order, then for that reason alone the Court should declare the findings and sentence against Miss Bailey invalid.

We will therefore address ourselves first to the question of the proper interpretation of the President's Order.

I.

EXECUTIVE ORDER NUMBER 9835 REQUIRES THAT FINDINGS OF DISLOYALTY AND INELIGIBILITY FOR GOVERNMENT EMPLOYMENT BE SUPPORTED BY EVIDENCE IN THE RECORD.

1. The plain intention of the Order is to provide a fair hearing under traditional American standards.

The fundamental question is whether the President's Executive Order 9835 requires a fair hearing. Plainly no fair hearing was given petitioner. She asserts that such a hearing is required.

The portions of the Executive Order relevant to our argument here read as follows:

The Preamble states:

> "Executive Order No. 9835, 12 F. R. 1935.
>
> "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government
>
> • • •
>
> "Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:
>
> "Now, Therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, • • • it is hereby, in the interest of the internal management of the Government, ordered as follows:"

Part V is headed "Standards" and begins:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

Part II of the Executive Order provides for the appointment of loyalty boards "for the purpose of hearing loyalty cases" and states that an employee "who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board. . . " It provides further that "the rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, . . ."

In short, the President's Executive Order was designed not only to oust disloyal employees but, as its preamble stated, it was equally designed to provide "protection from unfounded accusations of disloyalty" to the loyal employees of the government. It provided for "hearings" before any adverse decision and it provided that such an adverse decision could be made only "on all the evidence."

It is plain that the Executive Order was not complied with in the present case. Miss Bailey was not afforded protection against an unfounded accusation of disloyalty. She was not given a hearing in any true sense of the word and the decision against her was not based on evidence. There is before this Court the transcribed record of the proceedings before the Regional Board and the Loyalty Review Board (LB and LRB). The record before this Court contains not one syllable of evidence against Miss Bailey. The decision against her was based not on evidence in the record or on any evidence whatsoever. The decision was frankly stated to be based upon secret reports, not disclosed to the employee, which were made to the FBI by informants not under oath whose identity was concealed even from the loyalty boards. The loyalty tribunals were in no position to weigh the reliability of information given by informants unknown to them. They acted in blind reliance on the representations of an investigative agency that some of the information it had received came from informants believed to be reliable. Such a procedure is

not a decision on evidence, after hearing, which the Executive Order provided.

The words "evidence" and "hearing" are not words of vague meaning. Evidence means sworn testimony of witnesses either in person or by affidavit. See Rule 43 of the Federal Rules of Civil Procedure. Rules applicable in court may be relaxed before administrative tribunals but by no stretch of the imagination can the term evidence include the secret reports relied on in the present case. This Court has also had occasion to consider the meaning of a requirement of a hearing. Thus, in *Morgan* v. *United States*, 304 U. S. 1, 18, 19, it stated:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one . . . Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature."

And in *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.*, 227 U. S. 88, 93, it said " . . . manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."

Plainly, in basing their rulings on secret information supplied by unidentified informants, the loyalty boards were not making findings on "evidence", after "hearing" as those terms have been understood by this Court. Equally plainly, they were not according employees the "protection from unfounded accusations of disloyalty" which the Executive Order promised them.

Assuming for the purpose of this argument that the President could constitutionally have imposed on Dorothy Bailey such personal disgrace and economic ruin, without

evidence, it is not reasonable to believe that he intended to do so in view of the plain language of the Order.

The President set up a procedure of hearings and appeal which, on their face, purported to provide a fair administrative hearing. The court below interprets them to mean that the employee has no protection whatever and that even the reviewing courts cannot question the certificate of an investigating agency as to what weight they should give the secret information. The so-called "hearings" and "appeals" mean under the construction of the court below only that the employee must defend himself without knowing the information which the Board has against him and without being given any real guide or clue as to how he may meet it. The court below is saying that when the President said that the employee was to retain the equal of "maximum protection" he did not mean maximum protection; that when he said "evidence" he did not mean evidence; that when he said "hearing" he did not mean hearing in even the minimal sense of the term. Such a departure from the plain meaning of words and from the avowed purpose of the Executive Order should not be permitted.

As this Court has stated in another context, "We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied", *Hecht Co.* v. *Bowles*, 321 U. S. 321, 330, and later " . . . if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain." *id.*

The fact that we are dealing with government employment which is a privilege rather than a right[5] does not

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[5] But *cf.* Universal Declaration of Human Rights as passed and proclaimed by the General Assembly of the United Nations on the tenth day of December 1948, as follows:

"Article 21 (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) *Everyone has the right of equal access to public service in his country.*" (emphasis supplied)

authorize a more restrictive interpretation. Thus this Court has held that aliens are entitled to a fair hearing in deportation proceedings even though the right to remain in this country is, like the right to work for the government, a privilege. And the right to a hearing was held available even though there was no express provision for a hearing in the statute authorizing deportation. This Court has been careful to see that the hearings are in fact fair and that the rulings are based on evidence. See cases cited in the dissenting opinion below (R. 139, 140). And aliens were at the last term of Court held entitled to the full procedural protection granted by the Administrative Procedure Act. *Wong Yong Sun* v. *McGrath*, 339 U. S. 33. Similarly in *U. S. ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537 where the question was one of the exclusion of an alien, an area of undoubted and absolute administrative discretion, the Court split on the question of reading into the War Bride statute a requirement of fair hearing.

Petitioner is not in the unprotected position of the alien in the *Knauff* case. In the present case the requirement of fair treatment need not be supplied by implication. Executive Order 9835 is clear in its desire to provide "protection" by "hearings" on "evidence".

In the past where tribunals have made decisions on the basis of secret information while purporting to give accused a hearing, it has shocked the conscience of jurists and laymen alike. Dreyfus was convicted on a secret dossier sent by the French Ministry of Justice to the hearing tribunal. The case aroused worldwide indignation and five years later the French Court of Cassation reversed. *The Dreyfus Case* by Alfred and Pierre Dreyfus, Yale University Press, 1937. German judges under Hitler used secret police records as evidence, justifying such use on the same grounds invoked here, i.e., security for the investigative agencies. These German judges are now in jail. Their reception of such material as evidence has been characterized by the President's own tribunal as the "final degra-

dation of the judiciary". *United States* v. *Joseph Alstoetter, et al.*, United States Military Court at Nuremberg. Germany.[5a]

Surely it is not conceivable that the President, in devising procedure to protect the accused equally with the government, authorized the use of this sort of procedure.

2. The present procedures of many of the loyalty boards in nonsensitive agencies show that the effectiveness of the loyalty program will not be impaired by requiring that the accused be confronted with the evidence against her.

No legitimate objective of the loyalty order will be adversely affected by a requirement of a hearing on evidence. The suggestion that the loyalty program will be unsuccessful unless loyalty boards are allowed to place blind faith in unidentified informants who are vouched for by some unidentified personnel of the FBI, is at variance with both the necessities of the government and experience of loyalty boards generally.

The facts concerning the procedure in loyalty hearings by the various boards are not published. It is our experience, however, that the practice of a great many of the government loyalty boards, when issues of fact are controverted, is to seek and obtain the appearance of witnesses against the employee for purposes of testimony and for cross-examination. We submit herewith a description of the loyalty board machinery, based upon our own experience. We invite the government for the benefit of the Court to use its own resources of access to the loyalty files to revise and supplement this information:

A. There are two types of loyalty boards with original jurisdiction. One set of boards operates within a particu-

[5a] The record is available at the Library of Congress.

lar department or agency of the government. Another group of boards is Civil Service Regional Loyalty Boards operating in Civil Service Regions throughout the country.

The agency boards usually consist of from three to five employees of a particular department or agency. These boards generally sit en banc although sometimes there is a substitution of membership. They have continuous supervision over the administration of the program in the agency, and are in charge of formulation and serving charges and conducting hearings. In some agencies the boards act on a full time basis or on a substantial part time basis. In other agencies they sit only occasionally. These boards are available for employees of the agency. Before these agency boards the procedure is universally followed of serving a set of formal charges and giving opportunity to answer. Agency board rulings are appealable to the head of the agency. From his adverse ruling an appeal may be had to the Loyalty Review Board.

By regulation of the Civil Service Commission, however, these agency boards are excluded from judging the loyalty of the employees of the agency who are newly appointed, or who have transferred from another government agency, or, as in the case of Miss Bailey, who have been laid off and reinstated to their old jobs.[6]

Employees in these categories are heard before Regional Boards of the Civil Service Commission. These Regional Boards are composed of a great number of private citizens who sit in panels of three selected for each particular case. In the case of Miss Bailey, the panel selected consisted of three lawyers engaged in private practice, one from Washington, D. C., one from Norfolk, Virginia, and one from Baltimore, Maryland.

The Civil Service panels do not serve charges but

[6] The validity of this allocation of functions was upheld by the court below against petitioner's objections (R. 121)

merely issue interrogatories to be answered.[7] Either from the interrogatories themselves or from the interrogatories as supplemented by questions before the board, the employee is usually able to obtain some idea of the issues which the board deems relevant. But the matter is not presented in forms of specific charges with specific answers, as is the case before the agency boards.[8] Decisions of Regional Boards are appealable to the Loyalty Review Board.

Neither the agency boards nor the review board on appeal make any decision or write any opinion which is available to the employee other than an ultimate conclusion, i.e., that there is reasonable ground for believing the employee

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[7] For example see the statements at LB 106, 110, 111 by the Chairman of the Regional Board that "Nobody has presented any charges" and "it sounds like you [a witness] have been informed that charges have been brought by the Board which is not true and which is not a fact."

[8] The procedure of the regional boards suffers in exaggerated form from the deficiencies described in *Morgan* v. *United States*, 304 U. S. 1, 19, as follows:

> "The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.
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> "Nor did the oral argument reveal these claims in any appropriate manner . . . The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order."

The Regional Boards do not have counsel and no contentions are ever stated except as they are implied from questions asked by Board examiners or Board members.

is disloyal or that there is not reasonable ground for believing that the employee is disloyal. There is an indication in the present case that the lower boards may write opinions stating their views. (See questioning by Mr. Seasongood, LRB 95.) But such opinions if they exist are not made available to the employee. Nor is any indication given except indirectly to the employee as to which of the inquiries directed to him are believed of substance.

All decisions favorable or unfavorable are either reviewed or audited by the Loyalty Review Board. The Loyalty Review Board, like the Regional Board, is composed of private citizens, who sit in panels of three. The full board has rarely been requested to sit on any case. It refused such a request in the present instance (R. 67).

B. On the hearing procedure, the loyalty boards do not have a specific consistent practice. They vary widely. In a great many cases there is no dispute as to fact. The charges are in general reasonably specific. The employees frequently admit allegations, e.g., of membership in organizations and offer explanations. In other cases allegations of time and place are so specific that documentary proof or disproof is possible. Thus, in perhaps the great majority of cases the right to prefer charges and require answer under oath is sufficient. No issue of fact or veracity is presented.

Where such an issue does exist, however, many of the agency boards are very meticulous in requesting from the FBI precise details as to charges. These agencies specify to the employees the times and place of alleged actions and *the names of informants*.[9] They make every effort to secure attendance of witnesses against employees. Since they have no subpoena power and cannot pay travel expenses, some of the agency loyalty boards make it a practice to travel wherever necessary throughout the United States to

[9] There are some variations in procedure. For example, some boards will reveal the names of identified informants only if the informant has stated his willingness to appear at the hearing.

hear the testimony of witnesses against employees. Thus, in a great many proceedings before agency boards, the informants against the employee have not only been identified but have appeared as witnesses and been subjected to cross-examination.

On the other hand, some agency boards accept the initial report of the FBI and make no attempt to secure further information or the attendance of witnesses. This was particularly true of the Civil Service regional boards at the time of the Bailey case.

The regional boards are composed of personnel changing from case to case. They have important private business or professional interests and devote occasional days to the work of the Boards. Accordingly they have not developed as consistent attitudes with respect to the protection of employees as have many of the agency boards. For example, we know of no case in which a regional board has sat outside its own region to hear testimony against employees. The Fourth Regional Board before which Miss Bailey appeared, so far as we know, had never secured the testimony of witnesses until that time. However, on April 20, 1949, after the instant case had been filed in the District court the Loyalty Review Board issued a directive to all loyalty boards requiring them to make every effort to secure the testimony of adverse witnesses and to certify this fact in their decisions.[10]

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[10] The text of the directive is as follows:

"United States Civil Service Commission
Washington 25, D. C.

April 20, 1949

Memorandum No. 41

To All Executive Departments and Agencies

Subject: Attendance of Witnessess at Hearings

All reasonable efforts should be made, wherever practicable, to induce all identified witnesses who have given the FBI or elsewhere, pertinent information adverse to the employee and are willing to do so, to attend the hearing, testify in the employee's presence

In substance, the practice with respect to the presentation of evidence against employees has depended largely on the discretion of the individual boards. Thus in the present case the practice of this board (1) in accepting the generalized allegations against Miss Bailey detailed by Chairman Richardson of the Review Board (see pages 7-9, supra) (2) in not obtaining more detailed time and place allegations and (3) in not obtaining the names of the witnesses or attempting to procure their appearance, was at variance with the policies followed by many agency boards at the time. That policy was, we believe, the governing policy of the Fourth Regional Board at the time. It was not, however, a policy adopted by loyalty boards generally, and indeed it could not be followed even by the Fourth Region after the directive of April 20, 1949.

Although this is merely the observation of one law firm which has appeared before a number of government loyalty boards, we believe that this observation is sufficient to establish that a decision requiring a hearing on evidence in accordance with the Executive Order will not interfere with

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and subject themselves to cross examination. All Loyalty Boards are instructed, whenever practicable, to invite every witness who (1) is personally identified; (2) has given the FBI pertinent information adverse to the employee; and (3) has not expressly indicated his unwillingness to testify at the hearing, to testify at the hearing. The invitation should be extended in a suitable manner, a reasonable time in advance of the hearing, if possible, so as to afford witnesses a reasonable opportunity to attend and should state the time and place where the hearing will be held and *that the Board cannot pay witness fees, or reimbursement for travel or other expense.*

If any such witness declines or fails to appear as a witness after being thus invited by the Board, the Board shall take into consideration any reason or excuse existing for failure or refusal of such witness so to testify, in considering and evaluating the testimony of such witness as it appears in the FBI report, or elsewhere.

It is desired that each Board shall suitably certify in its ultimate reported determination, that the provisions of this Directive have been duly complied with.

Seth W. Richardson,
Chairman
Loyalty Review Board."

the carrying out of the loyalty program. It will merely be requiring that all boards follow the better practice adopted by many loyalty boards in the agencies.

3. The reasons given by the court below for construing the term "evidence" to include undisclosed secret information are not supported either by the Order itself, by any consistent administrative interpretation of the Order or by the necessities of security.

We shall now examine the reasons why the court below construed the President's loyalty order as it did. Its conclusion we believe rests on several grounds, some expressed and others implied.

(i) The loyalty order expressly declares that investigative agencies may refuse to disclose the names of confidential informants under certain limited circumstances (Part IV, 2). An executive declaration requires such information to be kept in confidence as against legislative subpoena.[11] The court from these undoubted facts arrived at the conclusion that the President's Executive Order intended such secret information to be treated as evidence. This does not follow. Indeed, the executive order plainly distinguishes between investigative "material and information" which may be kept confidential and "evidence" which is the basis for an adverse conclusion.

Part I of the Order requires loyalty investigations of every applicant for civil employment in the government. Part II makes the head of each department responsible that disloyal persons currently employed are not retained in office. In carrying out that responsibility, the head of each agency is directed to prescribe loyalty determination procedures which are in accordance with the provisions of the Order.

Part IV of the Order is entitled "Security Measures in Investigations." It has nothing to do with the procedure or standards to be applied at the hearings. It requires the investigative departments or agencies of the government

[11] 13 Fed. Reg. 1359.

to supply on request of the head of an agency "*all investigative material and information*" they have (the term "evidence" is not used here). It specifically provides that an investigative agency may refuse to disclose the name of a confidential informant where it certifies in writing that non-disclosure is essential for the protection of the informant or the investigation of other cases. In such a situation the investigative agency must furnish "*sufficient information* about such informants on the basis of which the *requesting department or agency* can make an adequate evaluation of the information. . . " (Emphasis suppied)

Plainly the Order contemplates that the agencies and boards should use such secret material, information and reports as the basis either for bringing charges or conducting further investigations. Such reports may contain material of such a character that it may later be introduced as evidence. They may also contain rumors, opinions, and gossip which only create suspicion, but which may be useful as leads to obtaining evidence.

Thus an investigatory procedure and a method of instituting prosecutions is set up according to the familiar American pattern of investigation and prosecution of other offenses. The accused has no right to be heard at the preliminary investigating stages. He has no right to see the background information which leads to the bringing of charges against him. But if charges are brought, evidence from competent witnesses must be presented before an adverse decision can be made. Cf. *United States* v. *Grayson*, 166 F. 2d 863, 870, (CCA 2, 1948). Plainly the basis of an accusation may be any type of gossip. Conviction on the other hand in the face of a denial of the accusation must be on evidence in the record.

This interpretation is borne out by the language of the Executive Order. The secret files of investigative agencies which may be withheld are not referred to in Part IV of the Order as "evidence." Throughout the section they are called "material and information". In sharp contrast

Part V, section 1, sets up as a standard for a finding of disloyalty that it be based on "all the evidence".

(ii) As a second ground the court below argues that "if the Loyalty Boards were violating the President's instructions in so crucial a part of a program so widely publicized, he would surely have known it and would have corrected the error."

We submit that even on the court's erroneous assumption that the present case represents general practice under the Loyalty Order, this canon of construction of an Executive Order is an improper one. Under it, the correctness of an administrative interpretation would depend on the evaluation of the publicity given to it and the chances of its reaching the President's ears. If such an argument is to be considered at all we should be permitted to reply that it is our firm conviction that the President does not like the Dorothy Bailey ruling, and feels that no amendment of the Order is necessary to reinforce its clearly expressed intention. It seems plain that the President could not be expected to send private messages to quasi-judicial tribunals or to courts telling them how he wants them to construe his orders.

We submit that such conjectures on either side have no place in the judicial interpretation of an order which has all the force of a statute. The order must be construed like any other statute or order, by reference to its express language and avowed purpose.

(iii) The court below stated that "the procedure followed represented an administrative interpretation of an administrative order and the court follows such interpretations unless the error is clear." We believe it has been established that the error of the administrative body is clear by any standard. But administrative interpretations are entitled to weight only if they are in fact representative of a consistent administrative policy. See e.g., the reference to "administrative practice, consistent and generally unchallenged" in *Norwegian Nitrogen Products Co.* v. *United*

States, 288 U. S. 294, 315. As we have stated above, there was no consistent administrative interpretation of that order in the respect claimed. The procedure followed here seems to be substantially at variance with that of a great many loyalty boards at the time, and subsequent developments in practice have been in the direction of more orderly and traditional procedure.

(iv) We believe that the real reason for the court's error may be found in its analysis of the question before it. (R. 117, 118) It is clear from this discussion that the court fell into the trap which is so inviting in times of crisis, of erroneously believing that the clear dictates of justice in an individual case would prejudice the national interest. The exact language used by the the court in defining the question before it reads as follows (R. 117, 118):

> "The case presented for Miss Bailey is undoubtedly appealing. She was denied reinstatement in her former employment because Government officials found reasonable ground to believe her disloyal. She was not given a trial in any sense of the word, and she does not know who informed upon her. Thus viewed, her situation appeals powerfully to our sense of the fair and the just. But the case must be placed in context and in perspective.
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> ". . . So the question actually posed by the case is whether the President is faced with an inescapable dilemma, either to continue in Government employment a person whose loyalty he reasonably suspects or else to reveal publicly the methods by which he detects disloyalty and the names of any persons who may venture to assist him.
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> • • •
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> "The presentation of appellant's contentions is impressive. Each detail of the trial which she unquestionably did not get is depicted separately, in a mounting cumulation into analogies to the Dreyfus case and the Nazi judicial process. Thus, a picture of a simple black-and-white fact—that appellant did not get a trial

in the judicial sense—is drawn in bold and appealing colors. But the question is not whether she had a trial. The question is whether she should have had one.

"If the whole of this case were as appellant pictures it, if we had only to decide the question which she states and as she states it, our task would indeed be simple and attractively pleasant. But it is not so. *We are dealing with a major clash between individual and public interests. We must ascertain with precision whether individual rights are involved, and we must then weigh the sum of those rights, if there be any, against the inexorable necessities of the Government.* We must examine not only one side of the controversy but both sides." (Emphasis supplied)

We submit that no issue as defined by the court in the last paragraph above was before it. There is no clash between the "inexorable necessities of the Government" and Miss Bailey's rights. The rejection of the fantastic procedure by which Miss Bailey's career was destroyed would not impair the loyalty program. On the contrary, it would reassert and vindicate our cherished standards of fair play. It would mean that the procedures followed by the many loyalty boards which gave the "equal protection" specified in the President's order would be established as legal requirements.

More than this, assuming for argument that no constitutional question arises, all that is here involved is the question of construing an order of the President which he is at liberty to change. On this phase of the case, we are asking that the Court insist upon compliance with the President's Order, and that the Order not be annulled. If the President believes that the result is inadvisable, he can change his Order. An example of the flexibility available to him is the treatment of employees in certain "sensitive" agencies. There the Loyalty Order does not apply, (see Part VI 3 of the Order) and dismissal may be made without evidence.

The Congress has recently authorized the President to add additional departments or agencies to those where this special authority to discharge without evidence may be exercised. P. L. 733, 81st Cong. The Report by the Senate Committee on Armed Services on the bill, H. R. 7439, makes clear the distinction between cases where a clash between individual rights and the necessities of government exists and cases where it does not.

> "It will be noticed that the bill, as amended, is not designed to set aside the President's loyalty program. It is intended that his program will be continued. Executive Order 9835 of March 21, 1947, established procedures under which employees found to be disloyal, as distinct from poor security risks, could be removed from the Federal Government. This bill is concerned primarily with the problem of dealing with those Federal employees who, though loyal, are so careless as to jeopardize the national security. *Disloyal persons should not be permitted to be employed in the Federal service under any circumstances. They are not entitled to Federal employment of any kind. On the other hand, it is the opinion of the committee that if the Civil Service Commission so determines, a person separated as a security risk could be placed in another Federal job where the work is of such a nature as not to be jeopardized by his employment.*" (Emphasis supplied) S. Rep. No. 2158, 81st Cong., 2d Sess.

In other words, where punishment for disloyalty is inflicted which bans the accused from all government employment and brands him as a traitor, the finding must be on all the evidence. Where security is involved employees may be discharged without evidence but not punished. And the President is given free run to designate the agencies which are sensitive. What the court below has done is to declare that all agencies are sensitive and fair trials of charges of communism cannot safely be held in any of them. It has rejected the distinction made by the Congress and the President between sensitive and non-sensitive agencies and has deprived employees in non-sensitive positions of

the protections promised them. This is improper judicial legislation.

(v) The importance of a full opportunity to face the evidence and to defend against it is emphasized by the handicaps placed upon the employee by the vague standard of "reasonable ground for belief" that the employee is "disloyal". Thus a great punishment is imposed upon employees by an adverse finding under a vague and general standard which presents of itself the greatest difficulties. Under the circumstances it is especially important, if the employee is to have any protection, that he be given the fullest opportunity to meet the specific charges against him. The President purported to grant such a right. The procedure in the present case distorts an American hearing ordered by the President to an un-American pretense. It changes a procedure, fair on its face, to one in which investigators take over the judicial function of the tribunal, evaluate the reliability of informants which the tribunal has never seen, exercise an unreviewable authority to determine what even the tribunal shall see and what it shall not see, and decide what accusations shall be disclosed to the accused and what shall be kept secret. The resulting hearing is only an inquisition operating under the cloak of a trial.

The consequences of the court's interpretation are well expressed by Judge Edgerton (R. 138):

> "However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent to the agent who interviews him."

We submit that the President's promise of fair treatment to employees should be honored by the court in construing his order.

We will now consider the constitutional questions which are squarely presented only if the Court rejects our interpretation of the meaning of the Executive Order.

II.

THE DECLARATION OF INELIGIBILITY FOR GOVERNMENT EMPLOYMENT IS A PUNISHMENT WHICH HAS BEEN ILLEGALLY INFLICTED WITHOUT DUE PROCESS.

We respectfully urge this Court to take note of the fact that the action of the Loyalty Board declares the petitioner ineligible for employment in the Federal Government. This case is not a mere dismissal by the Government because of the unsuitability of the petitioner for the particular position she held. The Loyalty Board did not question her competence or ability to perform her job, nor did it consider any possible danger or disadvantage to the Government in her continuing in that job. Rather the Board was determining whether the uncorroborated secret files of a police agency disclosed any reasonable ground for doubting her loyalty to the United States. In so finding they determined that she was ineligible to hold any position however lowly or non-sensitive in the United States Government.

This is plain from the decisions of the loyalty boards. The decision of the Fourth Regional Board which was affirmed on appeal, reads as follows (R. 27):

> "As a result of such investigation and after a hearing before this Board, it was found that, on all the evidence, reasonable grounds exist for belief that Miss Bailey is disloyal to the Government of the United States.
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> "*Therefore, she has been rated ineligible for Federal employment;* she has been barred from competing in civil service examinations for a period of three years, and your office is instructed to separate her from the service." (Emphasis supplied)

The decision of the Loyalty Review Board which heard Miss Bailey's appeal (R. 63) as communicated to the Administrator of the Federal Security Agency reads as follows:

> "Please be advised that a panel of the Loyalty Review Board has duly considered the subject case on the basis of the complete file therein and has heard additional testimony by the appellant in her behalf and argument of counsel thereon. As a result, the members of the panel have reached the conclusion that the evidence in the entire record of the case is sufficient to sustain the finding of the Fourth Regional Loyalty Board that reasonable grounds exist for belief that Miss Bailey is disloyal to the Government of the United States. *The decision of ineligibility by the Fourth Regional Loyalty Board is therefore affirmed.*" (Emphasis supplied)

Plainly the basic decision was a decision that Miss Bailey was disloyal and ineligible for government employment. It was merely a necessary consequence of this conclusion that her name was stricken from all Civil Service registers (R. 26, 27); that she was barred from civil service examinations which are held for the purpose of establishing eligibility (R. 26) and that she was deprived of her existing employment on grounds of that ineligibility (R. 27).

Such a declaration of ineligibility was held by this Court in the *Lovett* case to be punishment. *U. S.* v. *Lovett,* 328 U. S. 303. It there held that a legislative rider accomplishing disbarment from government employment was invalid as a bill of attainder. For the same reason, the application of an identical sanction without a full hearing on the evidence is a violation of the due process clause. In the *Lovett* case, this Court said:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, . . .; acceptance

of bribes by members of Congress, . . .; or by other government officials, . . .; and interference with elections by Army and Navy officers, . . .

"Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial."

The Court further stated:

"The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal . . . The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a state or by the United States." (328 U. S. at 316-317).

It is significant that in the *Lovett* case hearings were held before a committee which received evidence not dissimilar to the evidence on which Dorothy Bailey was convicted. The majority of the Supreme Court cited these hearings to show that the punishment of proscribing Lovett and the others from Government employment had been intended by Congress and inflicted without a judicial hearing. They stated:

"The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and Federal Bureau of Investigation reports, the latter being treated as too confidential to be made public." 328 U. S. at 311.

The special concurring opinion of Justices Frankfurter and Reed conceded the illegality of a bar from government employment. They differ from the majority only in refusing to construe the legislative action as such a bar. The concurring judges pointed out that "No offense is specified and no declaration of guilt is made." 328 U. S. at 323. Here there is a clear finding of guilt and a sentence of ineligibility.

Both the majority and the concurring opinions in the *Lovett* case therefore compel the conclusion that President's order construed as the court below construed it is void as imposing punishment without due process of law.

Since it has been established that a determination of ineligibility for government employment is punishment of a most serious nature, it seems to us plain that the safeguards of a judicial trial as set forth in the Sixth Amendment are necessary. The views of Judge Edgerton on this score (R. 140-143) seem to us beyond question. However, even if there could be grounds for permitting such grave punishment to be imposed by an administrative official, it seems plain that the due process clause of the Fifth Amendment requires such sanctions be imposed only on evidence presented to that official with the right of confrontation, cross-examination and judicial review.

Basically, Miss Bailey's contention is that she was not given a fair trial either before a court or before an administrative agency. She was not confronted with the evidence against her and given an opportunity to meet it. We assert that the Constitution does not permit the elimination of this minimum safeguard where a finding of disloyalty and ineligibility for government employment is made. The conclusion we urge does not interfere with the security of the nation in any way. It merely protects the citizen from an unfounded blanket declaration which makes him an outcast. Where the security of the nation may be involved, Congress, as we have shown above, has made provision for discharge in sensitive agencies without evidence. But persons discharged under that authority are not branded as traitors nor are they barred from government employment for which they may be fitted. And the President has been given full authority to add agencies wherever it appears that the security of the nation makes it appropriate.

We are putting to one side cases where dismissal is made for the reason that the employee does not possess the out-

standing requirements of reliability and public confidence which may be required in a security sensitive position. We are putting to one side cases of dismissal where they are not based on a finding of disloyalty. We are dealing only with a case of employees in non-sensitive positions who are accused of disloyalty. In such cases it seems to us plain that the Constitution requires that the standards of fair hearing and due process be adhered to.

The court below recognized the principle of the *Lovett case* that ineligibility from government employment is a punishment which cannot be imposed without the safeguard of due process. It attempted to avoid the application of that principle here by reversing the declaration of ineligibility and at the same time sustaining the dismissal. It declared that " . . . the portions of the orders and directions of the defendants appellees which purported to bar Miss Bailey from federal employ for three years are invalid" (R. 122). It remanded for the entry of a decree "holding invalid those sections of the orders of the Loyalty Boards and the Federal Security Agency which would bar Miss Bailey from employment for three years, and holding valid those sections which accomplished her removal from the rolls and from office in the classified civil service." (R. 136)

We submit that this limited reversal of the Order does not accomplish what the Court apparently intended, i.e., the removal of Miss Bailey's ineligibility. Ineligibility automatically follows a finding of disloyalty. That is the basic intention of the President's Order. The loyalty boards clearly understood and correctly interpreted the Order in this respect. As Senate Report on P. L. 733 (quoted above) says:

> "Disloyal persons should not be permitted to be employed in the Federal service under any circumstance. They are not entitled to Federal employment of any kind."

This is only a reinforcement of the language of the Order. There is therefore no possible way that the Court can remove Miss Bailey's ineligibility from Federal employment without reversing the finding of disloyalty.

But even if the Court had in fact restored Miss Bailey's eligibility by reversing the finding of disloyalty its failure to restore her to her job would still have been punishment.

Any other conclusion would permit the sanction of the courts to attach to a declaredly illegal action. For of course a restoration to "eligibility" which does not erase all the consequences of the illegal declaration of ineligibility is a vain act. It does not repudiate the illegal decision of the loyalty board in the only way it can be repudiated,—by restoration to Miss Bailey of all that was taken from her by the illegal decision. It continues all the damage done by the order and removes none of it. The *Lovett* case plainly held that the bar to employment of the plaintiffs there *in the jobs they held* was illegal and they were paid for their work in those jobs. They were not merely promised a right to seek other government employment. As Judge Edgerton said (R. 141-142):

> "The distinction this court draws between dismissal as punishment and ineligibility as punishment not only contradicts the *Lovett* case but has no basis in reason. Dismissal is more certainly damaging than ineligibility, for the necessary combination of vacancies, qualifications, and desire for public appointment may never occur again. A person dismissed as disloyal can obtain no normal employment, public or private. The President's Committee on Civil Rights said in 1947: 'It is a severe punishment to be discharged from the government for disloyalty, as the Supreme Court pointed out in 1946 in *United States* v. *Lovett*. . . . Loss of job and inability to obtain another one is a severe punishment to impose on any man.' It makes no present or probable future difference to the appellant and it should make no difference to a court whether the appellant is told that she is separated from the civil

service for life, for three years, or only for the moment. Whatever she is told, if her dismissal is sustained she will not be reemployed while the present climate of opinion continues."

III.

THE ORDER ABRIDGES FREEDOM OF SPEECH AND ASSEMBLY.

Petitioner's dismissal on the vague and uncertain standards involved in a finding that reasonable grounds exist for the belief that she is disloyal abridge freedom of speech and assembly. This point has been exhaustively discussed in the opinion of Judge Edgerton (R. 143-146). We can add only that if such vague standards as set forth in the loyalty order are sustained by this Court it will add strength to a dangerous tendency. The knowledge that loyalty boards may punish unorthodoxy of thought, or even failure to agree with the opinions of the board members, has already resulted in a dangerous limitation of the freedom of speech of government employees and an impairment of the efficiency of government service. In the light of the gravity of the punishment, government employees are apt to keep silent and to avoid the company of controversial personalities. Yet in their hands has been placed the primary burden of upholding American freedom against constant attack everywhere in the world. Today more than ever, the government must be conducted by a personnel free to make policy as a result of frank interchange of diverse opinions. Presence of the vague standards of the loyalty order make it more difficult to abide by Judge Brandeis's injunction that "If we would guide by the light of reason, we must let our minds be bold." [12]

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[12] *New State Ice Co.* v. *Liebman*, 285 U. S. 262, 311.

CONCLUSION.

The judgment of the court below should be reversed with directions to remand the cause to the District Court for the entry of judgment for the plaintiff, declaring that plaintiff was improperly suspended and improperly removed from her position, that she is entitled to reinstatement to that position with back pay, and for other appropriate relief.

Respectfully submitted,

THURMAN ARNOLD,
ABE FORTAS,
PAUL A. PORTER,
MILTON V. FREEMAN,
Counsel for Petitioner.

September 20, 1950.

APPENDIX.

EXECUTIVE ORDER NO. 9835, 12 F. R. 1935.

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT.

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I

INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.

b. Civil Service Commission files.

c. Military and naval intelligence files.

d. The files of any other appropriate government investigative or intelligence agency.

e. House Committee on un-American Activities files.

f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.

g. Schools and colleges attended by applicant.

h. Former employers of applicant.

i. References given by applicant.

j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

Part II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than

three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

Part III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Part IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V

Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or

agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI

Miscellaneous

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE.
MARCH 21, 1947.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Executive Order involved	2
Statement	2
Summary of argument	9
Argument:	
I. Preliminary statement concerning Executive Order 9835	13
a. The provisions of Executive Order 9835	14
b. Executive and legislative action preceding the adoption of the order	24
c. Other circumstances preceding the adoption of the order	39
d. Events since the issuance of the Executive Order	48
II. Petitioner's contention as to the unconstitutionality of Executive Order 9835 cannot prevail	58
a. The appointment and removal of government employees is a matter of executive discretion which is subject to judicial review only for compliance with applicable statutes or regulations	59
b. The procedures here followed violate no rights of petitioner under the Fifth and Sixth Amendments	67
c. The action here taken does not infringe any constitutionally protected right of petitioner to freedom of speech	79
III. The action here taken was in full conformity with the Executive Order and with applicable statutory provision	99
a. The procedure followed in petitioner removal complied with the Executive Order	99
b. The Order and the procedure here followed are not inconsistent with any statutory requirements	111
Conclusion	117
Appendix	119

907743—50——1

CITATIONS

Cases:

	Page
Adams v. *Nagle*, 303 U. S. 532	63
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227	58
Alaska Smokeless Coal Co. v. *Lane*, 250 U. S. 549	63
American Communications Assn. v. *Douds*, 339 U. S. 382	11, 12, 25, 28, 73, 76, 83, 86, 90, 96
Anderson, United States ex rel. v. *Simon*, 289 Fed. 715	62
Asher v. *Forrestal*, 71 F. Supp. 470	62
Bennett v. *United States*, 89 C. Cls. 322	62
Block v. *Sassaman*, 26 F. Supp. 105	62
Borak v. *Biddle*, 141 F. 2d 278, certiorari denied, 323 U. S. 738	65
Bowles v. *Seminole Rock Co.*, 325 U. S. 410	111
Boyer v. *The King*, [1949] 94 Can. C. C. 195	48
Bratton v. *United States*, 90 C. Cls. 604	62
Brown v. *Lane*, 232 U. S. 598	61
Burnap v. *United States*, 252 U. S. 512	61
Butler v. *Pennsylvania*, 10 How. 402	64
Carr v. *Gordon*, 82 Fed. 373	62, 69, 113
Carrick v. *Lamar*, 116 U. S. 423	62
Carter v. *Forrestal*, 175 F. 2d 364	61
Chicago & S. Air Lines v. *Waterman Corp.*, 333 U. S. 103	77
Chicago Gt. Western R. R., United States ex rel. v. *I. C. C.* 294 U. S. 50	63
Coffman v. *Breeze Corps*, 323 U. S. 316	58
Colegrove v. *Green*, 328 U. S. 549	58
Crenshaw v. *United States*, 134 U. S. 99	61, 64
Culligan v. *United States*, 107 C. Cls. 222, certiorari denied, 330 U. S. 848	62
Cummings v. *Missouri*, 4 Wall. 277	72
Decatur v. *Paulding*, 14 Pet. 497	62
Eberlein v. *United States*, 257 U. S. 82	61, 66, 71
Federation of Labor v. *McAdory*, 325 U. S. 450	58
Fleming v. *Mohawk Co.*, 331 U. S. 111	116
Flemming v. *Stahl*, 83 Fed. 940	62, 69, 113
Friedman v. *Schwellenbach*, 159 F. 2d 22, certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865	30, 58, 61
Gadsden v. *United States*, 111 C. Cls. 487	62
Gaines v. *Thompson*, 7 Wall. 347	62
Garland, Ex Parte, 4 Wall. 333	72
Girard Co., United States ex rel. v. *Helvering*, 301 U. S. 540	63
Golding v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643	62, 71
Hall v. *Payne*, 254 U. S. 343	63
Hammond v. *Hull*, 131 F. 2d 23, certiorari denied, 318 U. S. 777	62

Cases—Continued

	Page
Hennen, Matter of, 13 Peters 230	61, 64, 65
Hirabayashi v. *United States*, 320 U. S. 81	24, 116
Humphrey's Executor v. *United States*, 295 U. S. 602	60
I. C. C. v. *New York N. H. & H. R. Co.*, 287 U. S. 178	63
International Workers Order v. *McGrath*, No. 71, this Term	13
Joint Anti-Fascist Refugee Committee v. *McGrath*, No. 8, 1950 Term	13
Keim v. *United States*, 177 U. S. 290	61, 66
Kellom v. *United States*, 55 C. Cls. 174	62, 66
Kent v. *United States*, 105 C. Cls. 280	62, 71
Knauer v. *United States*, 328 U. S. 654	24
Lederman v. *Board of Education*, 95 N. Y. S. 2d 466	57
Lellmann v. *United States*, 37 C. Cls. 128	62
L'Hommedieu v. *Board of Regents*, 95 N. Y. S. 2d 114	57
Levine v. *Farley*, 107 F. 2d 186, certiorari denied, 308 U. S. 622	62
Levy v. *Woods*, 171 F. 2d 145	61
Litchfield v. *Register and Receiver*, 9 Wall. 575	62
Ludecke v. *Watkins*, 335 U. S. 160	116, 117
Maghan v. *Board of Commissioners of the District of Columbia*, 141 F. 2d 274	62
Morgan v. *Nunn*, 84 Fed. 551	62, 113
Myers v. *United States*, 272 U. S. 52	59, 60
Nalle, United States ex rel. v. *Hoover*, 31 App. D. C. 311	62
Nashville, C. & St. L. Ry. Co. v. *Wallace*, 283 U. S. 249	58
National Council of American-Soviet Friendship v. *McGrath*, No. 7, 1950 Term	13
Ness v. *Fisher*, 223 U. S. 683	63
Page v. *Moffett*, 85 Fed. 38	62, 69, 113
Palmer, United States ex rel. v. *Lamp*, 244 Fed. 377	62
Parsons v. *United States*, 167 U. S. 324	60
Perkins v. *Lukens Steel Co.*, 310 U. S. 113	63
Reagan v. *United States*, 182 U. S. 419	61
Rex v. *Gerson* (1947) O. R. 715	48
Rex. v. *Halliday (Ex parte Zadig)*, (1917) A. C. 260, 269	78
Rex v. *Harris* (1947) O. R. 461	48
Rex v. *Lunan*, 3 D. L. R. 710, O. R. 201	48
Rex v. *Mazerall* (1946) 4 D. L. R. 791, O. R. 762	48
Rex v. *Smith* (1947) O. R. 378	48
Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316	62
Rose v. *The King* (1947) 3 D. L. R. 618, 88 Can. C. C. 114	48
Sawyer, In re, 124 U. S. 200	61, 64
Schneiderman v. *United States*, 320 U. S. 118	25
Shurtleff v. *United States*, 189 U. S. 311	60, 112
Siskind v. *Morganthau*, 152 F. 2d 286	62
Taylor v. *Kercheval*, 82 Fed. 497	69, 113
Taylor v. *Taft, United States ex rel.*, 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461	62

Cases—Continued Page
Taylor and Marshall v. *Beckham*, 178 U. S. 548 64
United Public Workers v. *Mitchell*, 330 U. S. 75 11, 12, 58, 73, 83, 85, 86, 90, 93, 99
United States v. *Dennis*, 183 F. 2d 201 26, 49, 91
United States v. *Bichibegoff*, 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694 65
United States v. *Guthrie*, 17 How. 284 61
United States v. *Lovett*, 328 U. S. 303 11, 72, 73, 75
United States v. *Perkins*, 116 U. S. 483 60
United States v. *West Virginia*, 295 U. S. 463 58
United States v. *Wickersham*, 201 U. S. 390 65
United States Graphite Co. v. *Sawyers*, 176 F. 2d 868, certiorari denied, 339 U. S. 904 63
Von Knorr v. *Griswold*, 156 F. 2d 287 (C. A. 1) 78
Von Knorr v. *Miles*, 60 F. Supp. 962 reversed, *Von Knorr* v. *Griswold*, 156 F. 2d 287 78
Washington v. *McGrath*, No. 229, this Term 13, 58
Waterman v. *Somervell*, 34 F. Supp. 695, certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214 62
Weinstein v. *United States*, 109 C. Cls. 579 62
West v. *Hitchcock*, 205 U. S. 80 63
White v. *Berry*, 171 U. S. 366 61
Wilbur v. *United States*, 281 U. S. 206 63
Wittner v. *United States*, 110 C. Cls. 231 65
Works v. *Rives*, 267 U. S. 175 63
Yakus v. *United States*, 321 U. S. 414 94

Statutes:
Act of June 26, 1940, Section 15 (f), 54 Stat. 611, 620 28
Act of June 28, 1940, 54 Stat. 679, 50 U. S. C. App. 1156 29
Act of July 2, 1940, 54 Stat. 713 29
Act of June 28, 1941, 55 Stat. 265, 292 30
Act of July 1, 1941, 55 Stat. 396, 402 28
Act of July 2, 1942, 56 Stat. 468, 482 30
Act of July 2, 1942, 56 Stat. 634, 640 28
Act of July 5, 1946, 60 Stat. 458 51
Act of August 1, 1946, 60 Stat. 771 51
Act of July 9, 1947, 61 Stat. 288 51
Act of July 26, 1947, 61 Stat. 498 51
Act of July 31, 1947, 61 Stat. 696, 700 39
Act of June 3, 1948, 62 Stat. 315-316 51
Act of June 10, 1948, 62 Stat. 354, 5 U. S. C., Supp. II, 652 70
Administrative Procedure Act of 1946, 60 Stat. 237, 5 U. S. C. 1001 et seq 70, 106
Civil Service Act of 1883, 22 Stat. 403, 5 U. S. C. 632, et seq 68, 113
Hatch Act, section 9A, 53 Stat. 1148, 5 U. S. C., Supp. II, 118j 28, 119

Statutes—Continued Page
Internal Security Act of 1950, Public Law 831, September 23, 1950:
Sec. 2 55
5 (a) (1) (B) 55
7–15 55
101 55
Labor-Management Relations Act of 1947, Section 9 (Act of June 23, 1947, 61 Stat. 146, 29 U. S. C., Supp. II, 141, 149) 28
Lloyd-LaFollette Act, 37 Stat. 555, 5 U. S. C. 652 7, 29, 69–70, 106, 113
Public Law No. 179, 81st Cong., 1st sess 51
Public Law No. 266, 81st Cong., 1st sess 39
Public Law No. 733, 81st Cong., 2d sess 54
Public Law No. 759, 81st Cong., 2d sess 51
R. S. 1753 (Act of March 3, 1871, 16 Stat. 514) 69, 112, 113
Smith Act, 54 Stat. 687, 18 U. S. C. 10, 11 26
55 Stat. 42, 55, 75, 123, 131, 176, 197, 235, 303, 361, 394, 403, 446, 465, 497, 540, 576, 755, 837 29
56 Stat. 39, 78, 120, 131, 170, 225, 245, 349, 422, 460, 506, 561, 592, 610, 632, 641, 702, 721 29
57 Stat. 40, 99, 194, 216, 244, 270, 301, 346, 368, 429, 449, 493, 519, 537, 552 29
58 Stat. 186, 214, 320, 333, 358, 383, 425, 462, 508, 532, 546, 572, 595, 622, 885 29
59 Stat. 45, 75, 95, 130, 165, 201, 221, 259, 293, 360, 383, 405, 433, 487, 657 29
60 Stat. 77, 84, 167, 202, 269, 297, 408, 480, 497, 523, 564, 586, 596, 631, 700, 918 29
61 Stat. 23, 80, 119, 188, 233, 278, 306, 377, 394, 447, 491, 549, 571, 584, 607, 627, 693, 703, 944 29
62 Stat. 65, 192, 230, 333, 407, 422, 437, 449, 530, 558, 565 594, 669, 1025, 1050, 1058, 1149, 1195, 1204 29
62 Stat. 179 39
Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, Section 304 72
5 U. S. C. 16 114
Voorhis Act, 54 Stat. 1201, 18 U. S. C. 14–17 27
Canadian Order in Council 2363 27
Canadian Order in Council 5637 27
Constitution of the United States:
Article 2, Sections 2, 3 59
Amendments:
First Amendment 57, 79, 83
Fifth Amendment 68, 71, 75
Sixth Amendment 68, 71, 75

Congressional Material: Page

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56 Cong. Globe 26 81

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Miscellaneous:

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Benton, T. H., *Thirty Years' View* (1865), pp. 159–163 83

Chafee, *Free Speech in the United States* (1941) Appendix III 56

Miscellaneous—Continued Page
5 C. F. R. (1949 ed.):
§ 2.104 (7) ---- 4
§ 2.112 ---- 3, 22
§§ 210, 230 ---- 100
§ 210.7 ---- 22
§ 220.1 (a) (b) ---- 21, 22
§ 230.1 (a) (c) ---- 21, 22
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Executive Order 9830, 3 C. F. R. 108 (1947 Supp.) ---- 3
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Part I:
Sec. 1 ---- 15
2 ---- 15
3 ---- 15, 101
4 ---- 15
Part II:
Sec. 1 ---- 15, 16
2 ---- 16, 100, 103
3 ---- 16
4 ---- 17
Part III:
Sec. 1 ---- 17
2 ---- 17
3 ---- 17

Miscellaneous—Continued
Executive Order 9835, 12 F. R. 1935—Continued
Part IV: Page
Sec. 1 ---- 17, 101
2 ---- 18, 101
Part V:
Sec. 1 ---- 18, 97, 99
2 ---- 95, 100
Part VI:
Sec. 1 ---- 19–20
2 ---- 20
3 ---- 20
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Miscellaneous—Continued Page

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